

Forensic evidence is collected from a head-to-toe exam on a case-by-case basis, which can include swabs from the mouth, vagina and sometimes the rectum. A patient has the right to refuse any part of the exam.

“Typically when we swab the mouth, that is looking for the patient’s DNA, and everything else that is swabbed is looking for assailant’s DNA,” Kenyon says.

In some exams, the nurse takes photographs of the victim’s genitalia; it depends on the policies of the facility Kenyon says. Detectives sometimes photograph bruises on arms or legs of a victim.

“I always tell people, ‘This is your exam, not mine. I’m here to do what you would like to see happen,’” Kenyon says.

The victim’s head, fingernails and skin are also examined, and clothing and underwear are collected if relevant to obtaining DNA. Kenyon says she asks patients to run their fingers through their hair to collect the 24 to 30 head hairs that may be needed.

“We provide medications for emergency contraception, sexually transmitted infection prophylaxis and, if indicated, HIV prophylaxis,” Kenyon says.

When a victim is discharged, Kenyon says, they are given instructions on how and when to follow up. She wants to ensure that antibiotics have prevented an STI and the emergency contraceptives have prevented a pregnancy.

“There is a huge number of studies that show that people have lifelong medical needs following a sexual assault that can be emotional and can be physical as well,” Kenyon says. Those can range from abdominal pains and gynecological problems to cancers and heart disease.

Once a SAFE kit is collected, a law enforcement agency has seven days to pick it up from the medical facility and then must send it to the Oregon State Police Forensic Crime lab within 14 days, according to Melissa’s Law. It can then take several months to be processed for DNA.

Before the Bill

Capt. Meisel says no kits have been destroyed in two years since she’s been with EPD. Before the bill, anonymous kits could be destroyed after six months, in an effort to save space.

“Keep in mind a lot of this practice goes back to when DNA was in its infancy,” the police captain says.

In 2015, the Oregon State Police compiled a list of the SAFE kit backlog in Oregon. 5,626 rape kits were in the possession of 166 police departments, which included city, county and Native American police agencies.

OSP’s spokesman Fugate says a combination of things contributed to the SAFE kit backlog. A lot of police departments wouldn’t send anonymous kits to labs if they didn’t think the case was prosecutable, he says. Anonymous kits do not name the victims who have evidence collected. “So those would sit on shelves,” Fugate says.

Even after the passage of Melissa’s Law, OSP has a backlog of rape kits. “We already have all kinds of other cases from chemistry and controlled substances, fingerprints, gun testing, other biology cases, so that surge really put us behind,” Fugate says.

Brenda Tracy worked with Jackie Swanson, the Portland-based lawyer who represents victims of sexual



assault, and identified a need for new legislation to address backlogged rape kits in Oregon. Tracy says they went to Oregon Sen. Sara Gelser, a Democrat representing the Corvallis area, to talk about it. Gelser became the chief sponsor of Melissa’s Law.

“How horrible is that for the survivor who has the courage to go and get a kit done and then finds out it wasn’t tested and it was destroyed without their knowledge — I just think is a huge slap in the face,” Tracy says.

Fugate gives a list of hypothetical situations that resulted in the piling up of the backlog. “Let’s say you have a victim that recants their desire to prosecute, let’s say a couple days go by and they suddenly decide, you know, that I don’t want to prosecute for this,” he says. “It’s not just a stranger issue, it could be domestic violence sexual assault. So they could change their mind on that. Whatever the reason is, those would not get sent in — or if the DA ever decided that it was not a prosecutable case because of a ‘he said she said’ sort of thing.”

Lane County DA Perlow says that before the mandatory testing of SAFE kits, the decision would be made whether or not to test the kits based on evidence reports.

“If they both agree that there was a sexual encounter and the suspect is saying it was consensual and the victim is saying no it wasn’t consensual, but it occurred, everybody agrees it occurred, there’s no evidentiary value from that kit getting tested,” she says.

Burden of Proof and Prosecution

Melissa’s Law eliminates the guesswork that was once allowed to decide whether rape kits were tested or shelved.

The decision to prosecute is up to the DA’s office, and the burden is on the state to prove beyond a reasonable doubt that the defendant committed a crime — a burden that seems to weigh more heavily on the testimony of the victim regardless of the physical evidence obtained.

For a victim, the wait can seem endless to find out whether physical evidence is enough for the district attorney to file charges.

The woman still waiting to find out the status of her case says, the “DA told me the whole burden is on me — to somehow to prove that this happened.”

Perlow admits sexual assault cases are difficult to prosecute. “A person who is charged with a crime has to have some sort of mental state that makes them criminally culpable, whether it’s that they’ve committed a knowing act or an intentional act, and the definition of those are pretty much conduct versus result. I know that I’m committing a sexual crime against this person versus I’m intending the result of committing a sexual crime against this person,” she says. “We have to prove either one of those things.”

Perlow says the most challenging cases to prove are circumstances in which people know each other or have been in a relationship. “Those are probably the most common cases and as a prosecutor those are the most difficult cases to prove because you don’t have independent witnesses to the act,” she says.

In 2016, 58 reports of sexual assault were reported to the Lane County District Attorney’s Office. Of those, 17 charges were filed. One case is pending trial set for March.

“If the survivor is a female and the suspect is a male, which is the most common circumstance we get, if he denies there was sexual contact and then there’s physical evidence contrary to that, those cases are easy to prove,” Perlow says. “If it’s a delayed report and there isn’t any physical evidence, those cases are really difficult to prove.”

Perlow says her office’s ethical obligation is to prosecute only cases that can be proved beyond a reasonable doubt.

Gov. Kate Brown and Rape Kits

Gov. Kate Brown declined to be interviewed about Melissa’s Law and the statewide backlog of rape kits for this story.

Asked if she was aware of the number of backlogged rape kits, the governor’s spokesman, Brian Hockaday, says the governor is aware of the most recently published numbers by the Oregon State Police.

When asked whether Brown believed that Oregon’s justice system is fully addressing the problem of sexual assault, Hockaday said, “Certainly there’s more work to be done, and the governor is committed to improving the justice system in ensuring that all survivors as well as their families are supported and have the services they need.”

Hockaday says the issue of sexual violence is appalling. “Are you aware that she spoke to this issue from a very personal perspective during the campaign?” he asked. “She is a survivor herself.”

He adds, “This is an issue that she’s very personally passionate about and has fought to ensure that survivors have services they need and that they have access to justice.”

On Feb. 2, *The New Yorker* published the article, “Advice for Progressives From America’s Radical Feminist Governor,” which interviewed Gov. Brown about her time in office. According to the article Brown, “... donning a pink pussy hat and delivering the kind of speech that many had dreamed of Hillary Clinton giving: ‘In my Oregon, and under my leadership, women are in charge of their own bodies,’ she said, shaking with her fist.” The article quoted her saying, “I was born a feminist.”

EW asked Hockaday whether Brown thinks women are in control of their bodies after taking into consideration that one in four Oregon women will experience rape. He says the quote about women being in control of their bodies was strictly referring to women’s health care. — *Corinne Boyer*